

**IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE CONSENT ORDER**

IN THE MATTER OF:

Doug Harris
Louisa County, Iowa

ADMINISTRATIVE CONSENT ORDER

NO. 2008-AFO-11

TO: Doug Harris
6102 County Rd. X37
Morning Sun, Iowa 52640

I. SUMMARY

This administrative consent order is entered into between the Iowa Department of Natural Resources (DNR) and Doug Harris for the purpose of resolving the issues surrounding a manure discharge at Mr. Harris' facility and the resulting fish kill in Otter Creek. In the interest of avoiding litigation, the parties have agreed to the provisions below.

Questions regarding this administrative consent order should be directed to:

Relating to technical requirements:

Russell Royce, Field Office 6
Iowa Department of Natural Resources
1023 W. Madison
Washington, Iowa 52353-1623
Phone: (319) 653-2135

Relating to legal requirements:

Kelli Book, Attorney for the DNR
Iowa Department of Natural Resources
7900 Hickman Road, Suite 1
Urbandale, Iowa 50322
Phone: 515/281-8563

Payment of penalty to:

Iowa Department of Natural Resources
Henry A. Wallace Building
502 East Ninth Street
Des Moines, Iowa 50319-0034

II. JURISDICTION

This administrative consent order is issued pursuant to Iowa Code section 455B.175(1) which authorizes the Director to issue any order necessary to secure compliance with or prevent a violation of Iowa Code Chapter 455B, Division III, Part 1 and Iowa Code Chapter 459 and the rules adopted or permits issued pursuant thereto, and Iowa Code section 455B.109 and 567 Iowa Administrative Code (IAC) Chapter 10, which authorize the Director to assess administrative penalties.

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III. STATEMENT OF FACTS

1. Doug Harris owns and operates an animal confinement facility located at 6102 County Rd. X37 in Morning Sun, Iowa (Section 2, T-73 & 74 N, R-4-W, Louisa County). Mr. Harris is a contractor grower for TriOak Foods. Mr. Harris' facility consists of one wean to finish swine building with a capacity of 1,200 head.

2. On October 8, 2007 at 12:15 p.m., Nick Biggs, TriOak Foods employee, contacted DNR Field Office 6 to report a manure spill at Mr. Harris' facility. Mr. Biggs indicated the discharge had resulted in a fish kill in Otter Creek. Mr. Biggs was instructed to construct an earthen plug in the road ditch and into a field drainage ditch that was connected to Otter Creek in an effort to stop the manure flow.

3. Russell Royce, DNR Field Office 6, responded to the complaint. Prior to going to the facility Mr. Royce stopped at a point where Otter Creek crossed M Avenue (Site #1) just west of the city of Wapello, Iowa. At this location Mr. Royce observed a number of dead fish up and down the stream from the bridge. He collected laboratory samples. At this point, Mr. Royce contacted DNR Fisheries to notify them of the fish kill and to request assistance in the fish kill investigation. Mr. Royce then proceeded to the facility. He spoke with Dan Kelly, TriOak Foods employee, upon arriving at the facility. Mr. Kelly told Mr. Royce that the manure spill had first been discovered at 8:00 a.m. on October 6, 2007.

4. During the investigation, Mr. Royce met with Mr. Biggs. Mr. Biggs showed Mr. Royce the path the manure made from the confinement building to the tile intake to the road ditch along County Road X37. Mr. Royce noted that the grass was short around the building and there were a small amount of manure solids in the grass. Mr. Royce observed that the majority of the manure that left the building was likely watery in nature and observed only a small amount of manure solids around the earthen plug that had been constructed. Mr. Royce observed that down grade a few feet from the plug was a culvert that passes under County Road X37. Mr. Royce collected laboratory samples of the flow in the ditch on the west side of County Road X37 (Site #2). He also collected laboratory samples from the road ditch above the plug (Site #3). Mr. Royce then collected laboratory samples from the field ditch on the east side of County Road X37 below the plug (Site #4). This field ditch was the flow path that reached Otter Creek. Mr. Royce collected laboratory samples from Otter Creek upstream of where the manure entered Otter Creek (Site #5). Another field ditch was observed coming into Otter Creek from the west passing under County Road X37 (Site #6). Mr. Royce collected laboratory samples from this location to determine if anything from this ditch could have contributed to the fish kill. Mr. Royce then collected laboratory samples below the confluence of the field ditch and Otter Creek (Site #7). He continued down stream several hundred feet to a field bridge and collected laboratory samples at this location (Site #8). Mr. Royce collected laboratory samples directly down stream of the bridge on 65th Street (Site #9). The final laboratory samples Mr. Royce collected were from the point where Highway 61 passes over Otter Creek just south of the city of Wapello (Site #10). At

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this location, Mr. Royce also observed dead fish in Otter Creek. The results of the laboratory samples indicated the following:

Sample Location	Ammonia Nitrogen	Carbonaceous BOD
#1	2.3 mg/L	N/A
#2	0.10 mg/L	N/A
#3	71 mg/L	N/A
#4	5.1 mg/L	N/A
#5	0.10 mg/L	<2 mg/L
#6	0.09 mg/L	<2 mg/L
#7	0.08 mg/L	<2mg/L
#8	0.94 mg/L	N/A
#9	0.64 mg/L	<2 mg/L
#10	1.7 mg/L	<2 mg/L

5. On October 31, 2007, Mr. Harris was issued a Notice of Violation letter for failing to report the manure discharge within 6 hours of the release. Mr. Harris was required to submit a written report of the release to DNR Field Office 6 by November 12, 2007. On November 5, 2007, Mr. Harris submitted the written report to the field office.

6. The fish kill evaluation by the DNR Fisheries personnel concluded that 9,321 fish valued at \$3,850.74 were killed. The cost of performing this evaluation was \$345.68. The total fish kill assessment totals \$4,196.42.

IV. CONCLUSIONS OF LAW

1. Iowa Code section 459.103 provides that the Environmental Protection Commission shall adopt rules related to the construction or operation of animal feeding operations, including permit and minimum manure control requirements. The Commission has adopted such rules at 567 IAC Chapter 65.

2. Iowa Code section 455B.186 and 567 IAC 62.1(1) prohibit the discharge of pollutants into water of the state, except for adequately treated pollutants discharged pursuant to a permit from the DNR. Mr. Harris' facility does not have a permit and DNR Field Office 6 found evidence of the discharge of untreated pollutants into waters of the state. The above-facts indicate a violation of this provision.

3. Iowa Code section 459.311(1) and 567 IAC 65.2(3) state the minimum level of manure control for a confinement feeding operation shall be the retention of all manure produced in the confinement enclosures between periods of manure application. In no case shall manure from a confinement feeding operation be discharged directly into a water of the state or into a tile line that discharges to waters of the state. Manure from Mr. Harris' facility was discharged from the facility and traveled to waters of the state. The above-facts disclose a violation of this provision.

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4. 567 IAC 61.3(2) provides general water quality criteria and prohibits discharges that are toxic to animal or plant life. The discharge of manure from Mr. Harris' facility into Otter Creek is a violation of this provision in that it was acutely toxic to fish.

5. 567 IAC 65.2(9) requires that a person storing, handling, transporting, or land-applying manure from an animal feeding operation who becomes aware of a release shall notify the DNR of the occurrence of the release as soon as possible but not later than six hours after the onset or discovery of the release. The manure release at Mr. Harris' facility was discovered on October 6, 2007 at approximately 8:00 a.m. and was not reported to the DNR until October 8, 2007 at approximately 12:15 p.m. The above-facts indicate a violation of this provision.

6. Iowa Code section 481A.151 provides that a person who is liable for polluting a water of this state in violation of state law shall also be liable to pay restitution to the DNR for injury caused to a wild animal by the pollution. The DNR has adopted 571 IAC Chapter 113. 571 IAC 113 provides that a person who is liable for polluting a water of this state in violation of state law shall also be liable to pay restitution to the DNR for injury caused to a wild animal by the pollution. A fish kill resulted from the manure discharge at Mr. Harris' facility.

V. ORDER

THEREFORE, it is hereby ordered and Doug Harris agrees to do the following:

1. Doug Harris shall submit a Plan of Action to DNR Field Office 6 within 30 days of the date the Director signs this administrative consent order. The Plan of Action shall detail the steps that will be taken to ensure surface waters do not enter the manure pits;
2. Doug Harris shall pay restitution in the amount of \$4,196.42 within 30 days of the date the Director signs this administrative consent order; and
3. Doug Harris shall pay a penalty of \$5,000.00 within 30 days of the date the Director signs this administrative consent order.

VI. PENALTY

1. Iowa Code sections 455B.191 and 459.603 authorize the assessment of civil penalties of up to \$5,000.00 per day of violation for each of the water quality violations involved in this matter.

2. Iowa Code section 455B.109 authorizes the Environmental Protection Commission (Commission) to establish by rule a schedule of civil penalties up to \$10,000.00, which may be assessed administratively. The Commission has adopted this schedule with

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procedures and criteria for assessment of penalties in 567 IAC Chapter 10. Pursuant to these rules, the DNR has determined that the most effective and efficient means of addressing the above-cited violations is the issuance of an administrative consent order with an administrative penalty. The administrative penalty assessed by this administrative consent order is \$5,000.00. The administrative penalty is determined in accordance with the following:

Economic Benefit – Failure to properly contain all manure has allowed Mr. Harris to save time and money. Mr. Harris gained an economic benefit by failing to land apply the manure in a timely manner that would have kept the storage pit level low and prevented the overflow. Therefore, \$1,000.00 is assessed for this factor.

Gravity of the Violation – One of the factors to be considered in determining the gravity of a violation is the amount of penalty authorized by the Iowa Code for that type of violation. As indicated above, substantial civil penalties are authorized by statute. Despite the high penalties authorized, the DNR has decided to handle the violations administratively at this time, as the most equitable and efficient means of resolving the matter. Actual harm to the environment was documented by the impact to Otter Creek, including over 9,000 dead fish. Mr. Harris' failure to timely notify the DNR of the manure release likely increased the impact to the creek. If the field office had been notified immediately, containment devices could have been constructed to lessen the impact on the creek. The manure control and water quality violations threaten the integrity of the water quality program. Based on the above considerations, \$3,000.00 is assessed for this factor.

Culpability – Doug Harris has a duty to remain knowledgeable of DNR's requirements and to be alert to the probability that his conduct is subject to DNR's rules. Based on the above considerations, \$1,000.00 is assessed for this factor.

VII. WAIVER OF APPEAL RIGHTS

This administrative consent order is entered into knowingly and with the consent of Doug Harris. For that reason, Doug Harris waives the right to appeal this administrative consent order or any part thereof.

VIII. NONCOMPLIANCE

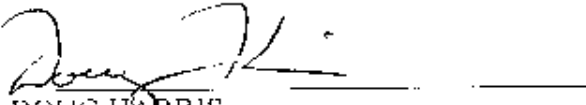
Failure to comply with this order, including failure to timely pay any penalty, may result in the imposition of further administrative penalties or referral to the attorney general to obtain injunctive relief and civil penalties pursuant to Iowa Code section 455B.191. Compliance with Section "V. Order" of this administrative consent order constitutes full satisfaction of all requirements pertaining to the specific violations described in Section "IV. Conclusions of Law" of this administrative consent order. DNR reserves the right to bring enforcement action, including penalties, or to request that the attorney general initiate legal

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action to address other violations not described in Section "IV. Conclusions of Law" of this administrative consent order but which may arise from the facts summarized in Section "III. Statement of Facts" of this administrative consent order. DNR specifically reserves the right to pursue enforcement action, including penalties, for any current violations not specifically cited in this order.


RICHARD A. LEOPOLD
Iowa Department of Natural Resources

Dated this 7 day of
April, 2008.


DOUG HARRIS

Dated this 16th day of
March, 2008.

#No facility number; Kelli Book; Field Office 6; Gene Tinker; EPA; LC.1 and VIII.D.1.a